

Investigation by the Department of
Telecommunications and Energy on its
Own Motion, pursuant to G.L. c. 164
§§ 1A(a), 1B(d), 94 and 220 C.M.R. 11.04
into the Costs that Should Be Included
In Default Service Rates for
Massachusetts Electric Company and
Nantucket Electric Company

I. Procedural Background

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On January 20, 2004, Massachusetts Electric Company and Nantucket Electric Company (“MECo”) submitted a filing to the Department as required by the November 17, 2003 Order.

The investigation of MECo’s default service filing has been docketed at D.T.E. 03-88E.

On February 17, 2004, the Department issued a Notice with respect to MECo’s filing in D.T.E. 03-88E and established separate deadlines for petitions to intervene and written comments. Both Centrica and Dominion filed petitions to intervene in this proceeding (hereinafter “Centrica Petition” and “Dominion Petition”).

At a March 11, 2004 procedural conference in this proceeding (and companion proceedings regarding other distribution companies’ default service costs filings), the Hearing Officer established March 19, 2004 as the deadline for distribution companies to submit written opposition to certain petitions to intervene, and March 24, 2004 as the deadline for responses to these oppositions.

On March 19, 2004, MECo filed with the Department its Opposition to the petitions to intervene of Centrica and Dominion (“MECo Opposition”). Consistent with the procedural schedule established by the Hearing Officer, Centrica and Dominion herewith file a joint response to the MECo Opposition.

II. Both Centrica and Dominion Meet the Requirements for Intervention as Set Forth in G.L. c. 30A, § 10(4) and 220 CMR 1.03(1)(b).

As required by G.L. c. 30A, §10(4) and 220 CMR 1.03(1)(b), both Centrica and Dominion have demonstrated that they “may be substantially and specifically affected” by these proceedings. Centrica has stated that it is a large retail supplier that is interested in participating in the Massachusetts retail electricity market, and, as such, would be affected by the allocation of costs between distribution rates and default service rates. Centrica Petition at 3.

Similarly, Dominion has stated that it presently serves customers in the Massachusetts electricity market and that it has an interest in “ensuring that Default Service rates are properly calculated...” Dominion Petition at 1.

Notably, in its Opposition MECo never states that either Centrica or Dominion is not or will not be substantially and specifically affected by these proceedings. Instead of addressing this core issue, MECo focuses on the commercial nature of Centrica’s and Dominion’s interest in this proceeding and other tangential issues.

With respect to Centrica, MECo argues that (1) Centrica asserts only a commercial interest, and (2) the nature of the issues Centrica wishes to address – the structure and regulatory features of the market – will not be addressed in this limited proceeding. MECo Opposition at 3-4.

MECo also argues that Dominion “at best asserts only a commercial interest” and that Dominion does not state how it will be affected by this proceeding. While MECo notes that Dominion has stated that it “also has an interest in ensuring that Default Service rates are properly calculated in order to send the proper price signals to consumers and promote the further development of the competitive market”, MECo views this as only “a general statement about the marketplace” (MECo Opposition at 3).

MECo’s efforts to parse language in the Centrica Petition and Dominion Petition cannot disguise a simple and inescapable fact – that the default service rate established by the Department in this case will constitute the “price to beat” for Centrica, Dominion and other suppliers. How this rate is set and whether it is set accurately is of substantial interest to Centrica and Dominion and will affect these companies’ operations in the Massachusetts electricity marketplace over coming months.

In fact, both the Centrica Petition and the Dominion Petition indicate an interest in accurately establishing this electricity “price to beat”. While it is the case that Centrica stated in its petition to intervene that it “would be interested in entering the Massachusetts retail electricity market should the structure and regulatory features of the market present an opportunity” (Centrica Petition at 3), Centrica’s intervention petition goes well beyond its general interest in the Massachusetts market and focuses directly on its *interest in this proceeding*. Specifically, Centrica has stated that “[T]he allocation of costs between distribution rates and the default price is certainly a key regulatory feature of the market and, in that respect, Centrica and its ability to enter and compete in the Massachusetts market may be substantially and specifically affected by these proceedings.” *Id.*

Similarly, Dominion has made clear that it is interested in ensuring that the default service rate is properly calculated and that correct price signals are sent to the marketplace. Dominion Petition at 1.

In fact, it is difficult to understand how Centrica or Dominion could have been more clear or more precise regarding its interest in this proceeding and why it is substantially and specifically affected by this proceeding. In this proceeding, the Department will establish the electricity “price to beat” for MECo default service customers. Making sure that rate is calculated properly is of paramount importance to both of these suppliers.

III. The Department Should Not Use Its Discretion Relative to Petitions to Intervene to Exclude Centrica and Dominion from this Proceeding.

While the Supreme Judicial Court (1) has concluded that agencies have broad discretion to grant or deny intervention (*Tofias v. Energy Facilities Siting Board*, 435 Mass. 340 (2001) (“*Tofias*”)), and (2) has upheld the decision of the Department to deny intervenor status to a

competitor with an economic interest in a proceeding (*Cablevision v. Department of Telecommunications and Energy*, 428 Mass. 436 (1998) (“*Cablevision*”)), MECo attempts to extrapolate the holdings in these cases to support the denial of petitions to intervene by suppliers who compete in the very industry which is the subject of this proceeding and who will compete against the very rates which will be established in this case.

Unlike the petitioners seeking to intervene in *Tofias* and *Cablevision*, both Centrica and Dominion seek to intervene here because they are (or seek to be) competitors in the Massachusetts retail electricity market. Of course, there is no logical basis for excluding electricity suppliers from a proceeding in which the electricity “price to beat” will be established. The Supreme Judicial Court in *Cablevision* recognized the profound difference between intervention by competitors in another industry and intervention by competitors in the industry that is the subject of the proceeding:

The department has not considered inter-industry competition to be a relevant factor in evaluating the public interest under G.L. c. 164, § 96. *In various circumstances, intra-industry competitors have had standing to challenge agency action that allegedly caused them harm.* See *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins.*, 373 Mass. 290, 295-296, 367 N.E.2d 796 (1977); *Everett Town Taxi, Inc. v. Aldermen of Everett*, 366 Mass. 534, 538-539, 320 N.E.2d 896 (1974); *South Shore Nat'l Bank v. Board of Bank Incorporation*, 351 Mass. 363, 367-368, 220 N.E.2d 899 (1966); *A.B. & C. Motor Transp. Co. v. Department of Pub. Utils.*, 327 Mass. 550, 551, 100 N.E.2d 560 (1951). *There is, however, no parallel inter-industry authority that supports standing.* Our cases have recognized that the department's task, assigned by the Legislature, is the “protection of ratepayers.” See *Commonwealth Elec. Co. v. Department of Pub. Utils.*, 397 Mass. 361, 369, 491 N.E.2d 1035 (1986), cert. denied, 481 U.S. 1036, 107 S.Ct. 1971, 95 L.Ed.2d 812 (1987), and cases cited.

Cablevision at 438 (emphasis added).

In its Opposition, MECo argues that Centrica and Dominion “are not Mass. Electric customers, and their customers are not Mass. Electric default service customers” (MECo

Opposition at 3. Thus, MECo attempts here to create a closed adjudicatory circle where only ratepayers¹ can question a distribution company's data or examine its calculations. In MECo's perfect world, competitive suppliers could be no more than helpless bystanders, unable to test or question the very rates and charges which could "make or break" them. Such a vision would be untenable with respect to any proceeding in which electricity rates are to be set, but it is particularly inappropriate in the case of a default service rate proceeding which grows out of an earlier proceeding, D.T.E. 02-80, in which the Department took steps to allow for more meaningful competition in the retail electricity market.

Certainly, the Department has not opted to exclude intra-industry competitors from gas or telecommunications rate proceedings. In proceedings regarding gas rates, the Department has granted intervenor status to gas marketers. *See* Bay State Gas Company, D.T.E. 01-81 (December 4, 2002); Bay State Gas Company, D.P.U. 95-104 (1995); Fall River Gas Company, D.P.U. 96-60 (1996); Boston Gas Company, D.P.U. 96-50 (Phase I) (1996); Commonwealth Gas Company, DPU 95-102 (December 22, 1995). Similarly, competitive local exchange companies have been allowed to intervene in proceedings regarding Verizon customer rates. *See* New England Telephone and Telegraph d/b/a NYNEX, D.P.U. 96-68 (1997); New England Telephone and Telegraph d/b/a NYNEX, D.P.U. 94-50 (1995).

In the end, any decision to deny intervention to competitive suppliers in a proceeding where the electricity "price to beat" will be established would be both extraordinary and unnecessary. First, neither case law nor Department precedent supports the denial of intervention to a potential intervenor that is substantially and specifically affected by the rates being set in the

¹ In referencing entities whose customers are "Mass. Electric Default Service customers", MECo appears to be referring to itself, or possibly to wholesale electric suppliers, who would appear to have less of an interest in this proceeding than competitive suppliers who must compete with default service rates.

industry in which the potential intervenor operates. Second, it would be particularly appropriate for the Department to use its discretion to deny intervention in an intra-industry context in a case which springs from a prior proceeding which was predicated on the Department's interest in allowing for more meaningful competition in the restructured electricity industry.

IV. Statements Made by Centrica and Dominion in Joint Written Comments Filed in this Proceeding Have No Bearing on the Issue of Intervention.

While it may be the case that the joint written comments submitted by Centrica and Dominion in this proceeding call for the Department to take a more expansive view of this proceeding, statements made by Centrica and Dominion in those joint comments have no bearing on whether Centrica and Dominion are substantially and specifically affected by this proceeding.

In its February 17, 2004 Notice in this proceeding, the Department established one track for petitions to intervene and a separate track for written comments. Clearly, the Department understands the difference between petitions to intervene -- through which entities are required to demonstrate that they are substantially and specifically affected by the proceeding -- and written comments -- through which entities can provide the Department with views on a broad range of issues associated with the proceeding. Here, Centrica and Dominion have availed themselves of the opportunity to provide written comments on how this particular proceeding might be reformulated to address more effectively a number of issues directly related to matters at issue in this proceeding. Despite MECo's concerns, the suggestions put forth by Centrica and Dominion in joint written comments in this proceeding have no bearing on whether Centrica and Dominion are substantially and specifically affected by this proceeding. Moreover, the filing of these joint written comments surely do not lead to the conclusion that it would be a "waste" of time for Centrica and Dominion to participate in this case. *See* MECo Opposition at 4.

In the end, there are a number of options available to the Department with respect to these joint written comments: the Department can adopt all or some of suggestions made by Centrica and Dominion, ignore them entirely, or apply them in some other context outside of this proceeding. The Department, however, may not choose the punitive option suggested by MECo and deny intervention to Centrica and Dominion. Where Centrica and Dominion are both substantially and specifically affected by this proceeding, intervention is warranted.

CONCLUSION

For the foregoing reasons, Centrica and Dominion respectfully request that the Department grant their petitions to intervene and accord them full party status in this case.

Respectfully submitted,

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